IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1120.

ANTHONY MAGGIO, CARL IPPOLITO, GUGHELIMO CICCONE, and BARTHOLOMEW DiNOLA,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

PETITIONERS' REPLY BRIEF.

HAROLD SIMANDL,
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PETITIONERS' REPLY BRIEF.

1. In its argument (Br. p. 8), the Government asserts that Ippolito "* * * was seen working around the premises on at least two occasions shortly before the raid (R. 96)". The statement is inaccurate. The witness merely stated, pointing at Ippolito: "This man here looks familiar" (R. 96).

She did not state that he was one of the men who was working there, or that he was ever on the premises. The fact that petitioner lived in Trenton all of his life, might account for her impression he "looked familiar to her".

During the cross examination of the witness, the District Attorney asserted: "* * * This witness has identified one Carl Ippolito". On counsel's protest that she had not, and at the request of counsel, the Court struck the remark, adding (R. 104, 105):

> "I will strike it from the record. What this witness said was that Carl Ippolito looks familiar to her.
>
> Mr. Stanziale: I will qualify my statement to that effect; this witness says one of the men working around there she believes was Carl Ippolito.
>
> (Page 105) Mr. Reich: I object, there was no such testimony, your Honor.
>
> The Court: I will strike it."

The Court's specific charge to the jury relating to this testimony is as follows (R. 691):

> "The witness Irma Todtenhausen did not testify that she saw the defendant Carl Ippolito do anything upon the premises where the still was set up—1060 Revere Avenue, Trenton, New Jersey. She did not

> even testify that she saw the defendant Ippolito upon the premises. Her testimony was only to the effect, as far as the defendant Ippolito was concerned, that he looked familiar to the witness Mrs. Todtenhausen."

In his brief below the District Attorney said (at p. 10):

> "There was other government testimony but it was not sufficiently definite to connect Ippolito. For instance, there was testimony by one Irma Todtenhausen that Ippolito looks familiar, when asked to identify a man who did certain work around the cellar of the still premises, but she did not definitely identify Ippolito as that man (Tr. 96)."

The Circuit Court of Appeals decided that (R. 722):

> "In addition to Bematre's testimony the evidence as to each of the defendants was as follows:
> Carl Ippolito: During approximately six weeks prior to the raid Ippolito was frequently seen in the company of Bematre, Ciccone, DiNola and Marcanthony."

The foregoing erroneous statement of fact made by the Solicitor General was inserted to escape the decision of this Court in *United States of America* vs. *Falcone*, 311 U. S. 205, at page 210, that:

> "It could not be inferred * * * from the casual and unexplained meetings of some of the respondents with others who were convicted as conspirators, that respondents knew of the conspiracy."

2. The Government points to a colloquy between the District Attorney and counsel, in order to establish that the witness's answer was wholly unexpected and unrespon-

sive. In light of the record, the colloquy establishes most clearly how really deliberately the District Attorney acted.

The District Attorney sought permission to talk to Bematre before he took the stand (R. 462, 63). It must be assumed he knew of the incident. If any doubt on that score still remains, the examination by the District Attorney (R. 639), where he led the witness through a recital of the intimate details, should remove any doubt remaining. After the motion for a mistrial, the obvious confusion of the District Attorney, as exhibited by his questions (R. 576), and the nature of the questions then asked which called for matters already in the record, indicates clearly the witness had nothing other than the "robbery incident" to talk about.

If the District Attorney wanted to find out if the witness had visited the still—a question—what happened to *you* personally would not elicit it.

Furthermore, assuming he knew of the incident, as we have a right to assume from what has been said, when the witness started to describe the robbery, and before he did so, the District Attorney could have *then said:* "No, no, about the still"—and thus prevent testimony of the robbery from coming to light. Instead, he led the witness on with the question: "What happened to you—" (R. 575),

We believe our assertion that the testimony was deliberately elicited is fully sustained by the record.

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Petitioners.